

2009

Teddy Eugene Osborne v. Negha Jean Osborne : Brief of Appellant

Utah Court of Appeals

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Teddy Eugene Osborne; pro se.

Negha Jean Osborne; pro se.

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IN THE UTAH COURT OF APPEALS

TEDDY EUGENE OSBORNE,)	
Petitioner and Appellant,)	CASE NO. 094900234
)	
v.)	
)	
NEGHA JEAN OSBORNE,)	
Respondent and Appellee,)	

BRIEF OF APPELLANT

**Appeal from Judgment denying Petitioner's Objection to
Commissioner's Recommendation of Respondent's Motion for Order to
Show Cause, Money Judgment, Property Division of Retirement
Benefits, Attorney Fees
Third Judicial District Court
Salt Lake County, State of Utah
The Honorable William W. Barrett
Commissioner Michael S. Evans**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	1
JURISDICTION OF THE COURT	2
ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND PRESERVATION OF ISSUE.....	2,3,4,5
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE.....	5,6,7,8,9
SUMMARY OF ARGUMENT.....	9,10,11
ARGUMENT.....	12,13,14, 15,16

Petitioner was forced into early retirement disability on January 13, 2009 which began his 6 month waiting period before he would get his first disability check from the Railroad. Mr. Osborne’s Arkansas Alimony order called for it to end the day he retired. Respondent asked the order to be enforced after the Petitioner began his retirement. A portion of the alimony Mr. Osborne has been ordered to pay is what accumulated after he had already retired.

Respondent’s (Ms. Osborne) filing of the ‘Arkansas Judgment in Utah’ under Utah Foreign Judgment Act does not allow the Utah court to reopen, reexamine, or *alter* a foreign judgment. Marital Settlement Agreement did not award Respondent the Petitioners Tier II retirement.

Trial court’s issuance of a Qualified Domestic Relations Order (Q.D.R.O.) was an improper division of petitioners Railroad Retirement Benefits. The Marital Settlement Agreement was not in compliance with Public Law 98-76 amended section 14(b)(2). The Board has published regulations implementing section 14(b)(2) at Title 20 of the Code of Federal Regulations, **Part 295**

A. Petitioner ‘Mr. Osborne’ Marital Property Settlement Agreement was incorporated into his ‘Arkansas Divorce Decree’ which did not award Respondent (Ms. Osborne) the Petitioners Tier II portion of his Railroad Retirement. The Arkansas property settlement agreement was altered by a Utah court by issuance of a ‘Qualified Domestic Relations Order’ (Q.D.R.O.).

B. Petitioner filed a Motion to Modify Alimony in the state of Arkansas **September 23, 2009** due to his unforeseen forced disability retirement. Cleburne County Arkansas had continuing, exclusive jurisdiction over the parties. Case was heard in Arkansas on **November 9, 2009**. The Arkansas court determined that alimony ended the day Mr. Osborne retired (January 13, 2009)

C. Utah courts signed the Q.D.R.O. in October 2009, before Mr. Osborne could attend the modification hearing. The Q.D.R.O. was clearly a modification of the ‘Osborne’s Divorce Decree’. Because the case was heard in Utah the Arkansas court transferred the case to Utah. Jurisdiction of the ‘Arkansas Divorce Decree’ was transferred to the Utah Courts in **January 13, 2010**. The Q.D.R.O should be reversed because the Utah Courts did not have Jurisdiction over the decree. The Decree did not award Ms. Osborne any part of Mr. Osborne’s retirement benefits. The Decree did not meet the requirements of law as described by the Railroad Retirement Board. Without Jurisdiction the trial courts abused its discretion, because it was not merely ‘Enforcing’ an order or judgment, the agreement had to be modified.

D. Divorce decree’s ‘Marital Settlement Agreement’ was not in compliance with Title 20 of the Code of Federal Regulations, Part 295; (20 CFR 295.2), (20 CFR 295.3 a.1), (20 CFR 295.2 c.). (20 CFR 295.3 a), and (20 CFR 295.3 d) according to the Railroad Retirement Board’s provision.

Conclusion.....16,17,18

Certificate of Service.....19

Addendum.....

Hearing Transcript, October 5, 2009.....

TABLE OF AUTHORITIES

CASES

<i>Angell v. Sixth</i> , 656 P.9 405 (Utah 1982).....	
<i>Bankler v. Bankler</i> , 963 P.9 797 (Utah App.1998).....	
<i>Data Management Systems, Inc. v. EDP Corp.</i> , 709 P. 2.d 377 (Utah 1985)	
<i>Marshall v. Marshall</i> 915 P.2 508, 516 (Utah App 1996)	
<i>Oglesby v. Oglesby</i> , 510 p.9 1106, 1108 (Utah 1973)	
<i>Rule 59 and 60</i> , Full Faith and Credit Clause of the United States Constitution	

JURISDICTION OF THE COURT

Jurisdiction is conferred upon this Court pursuant to the Utah Rules of Appellate Procedure and Utah Code Annotated Section 78-2-2.

Jurisdiction was transferred to the State of Utah from the State of Arkansas on January 13, 2010,

ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND PRESERVATION OF ISSUE

1. **Issue:** Whether Respondent's filing a Foreign Judgment from the state of Arkansas gave the trial court of Utah jurisdiction to alter an Arkansas divorce decree's Marital Settlement Agreement. Trial court erred because it did not have the jurisdictional authority to sign an order that altered the division of property incorporated into the Divorce decree.

Standard of Review: This issue is reviewed in part for an abuse of discretion, and obvious jurisdictional issues. *See Bankler v. Bankler* 963 P.9 797 (Utah App.1998); *Angell v. Sixth District Court* 656 P. 9 405, (Utah 1982); *Oglesby v. Oglesby* 510 P.9 1106, 1108 (Ut.1973); *Data Management Systems, Inc. v. EDP Corp.*, 709 P. 2.d 377 (Utah 1985)

Preservation of Review: This issue was preserved when the Appellant timely filed on October 19, 2009, his Notice of Appeal in the trial court.

2. **Issue:** Whether the trial court erred by the ordering the improper division of Petitioner's Tier II annuity of his Railroad Disability Retirement. The trial court and Railroad Retirement Board did not properly follow the guidelines for the Partition of Annuities as described in G-177d (11-87).

Standard of Review: This issue is reviewed for abuse of discretion, and mistakes. Railroad Retirement Board's first decision about the Divorce decree from Arkansas denied Respondents request for Petitioners annuity saying the Marital Settlement Agreement and property division was not in compliance with Board Regulations. In accordance with the Regulations of the retirement Board, Ms. Osborne's Marital settlement Agreement did not include language that obligated the Board rather than employee to pay the spouse (20 CFR 295.3(a)). (See **Exhibit 9**) This issue is also reviewed for a clerical error in the letter from the R.R.B. to Ms. Osborne, in which the 4th paragraph refers to [Teddy E. Osborne] as respondent rather than Negha Jean Osborne as respondent. This is of particular importance because it

changes the suggestive meaning of a quoted sentence from the Marital Settlement Agreement. **(See attached Exhibit 8)**

Preservation of Issue: This issue was preserved when the Appellant filed an appeal October 19, 2009, and an Order to stay the judgment.

Issue: Whether the trial court erred in the money judgment against Mr. Osborne. Petitioner was officially declared retired January 13, 2009 by The Railroad Retirement Board and Social Security Services due to disability. That is the date Mr. Osborne's six month waiting period began. Petitioners divorce decree states alimony would end when he retired at which time he expected Respondent would be retired and that she would receive her own retirement set aside for her by the Railroad. Mr. Osborne's early retirement And consequent waiting period left him without income, while Respondent was working and supporting herself. It is not fair or logical that Mr. Osborne be ordered to pay alimony during his 'disability freeze'. Mr. Osborne agrees he should pay what he owed while employed from August 2008 to December 2008 and half of January 2009. Trial court abused its discretion by ordering Mr. Osborne to pay for the time he was without income, and Respondent was employed.

Preservation of Issue: This issue was preserved when the Appellant filed an appeal October 19, 2009, and an Order to stay the judgment.

Issue: Whether the trial court erred in ordering Mr. Osborne to pay Respondents Attorney fees. Parties should pay their own Attorney fees; there are no circumstances to justify Petitioner being ordered to pay respondents fees because she was employed and Mr. Osborne was not.

Standard of Issue: Trial court did not make sufficient findings in Mr. Osborne's financial ability to pay. A trial court "failure to consider any enumerated factors is ground for reversal on the fee issue". *See Marshall v. Marshall* 915 P2.d. 508, 516 (Utah Ct. App1996). Id. at 517

Preservation of issue: Issue was preserved when the Appellant filed an Appeal on October 19, 2009.

STATEMENT OF THE CASE

1. Petitioner/Appellant (Mr. Osborne) is a resident of Vernal, Utah; the Respondent (Ms. Osborne) is now a resident of Arizona.

2. Ms. Osborne is 59 years of age; Mr. Osborne became 61 years of age on March 30, 2010.
3. Mr. Osborne and Ms. Osborne were married approximately 34 years prior to their Divorce in 2003; they have five adult children living (six were born) of issue from their marriage, three live in Salt Lake City and two live in Phoenix.
4. The parties were divorced by Decree of the Cleburne County Court of Arkansas entered on December 30, 2003. **(See Attached Exhibit 1)**
5. The parties originally represented themselves pro se.
6. A Marital Settlement Agreement was merged and incorporated into the Divorce Decree. **(See Attached Exhibit 2)**
7. The Divorce Decree stipulates that “the parties have voluntarily waived findings of fact, conclusions of law, record of testimony, motion for a new trial, notice of entry of final Judgment, and right to appeal, but have not waived their rights to future modification.”
8. The Divorce Decree states that ‘alimony and maintenance shall be as set forth in the Marital Settlement Agreement.’”
9. By said Marital Settlement Agreement, the Petitioner agreed to pay “Monthly support checks to the Respondent in the amount of \$500” payments were to continue until the death of either party or upon Retirement of the petitioner.

10. January 13, 2009 Mr. Osborne had to retire due to disability. This is the date that his six month 'disability freeze' began. Mr. Osborne had to wait until August 5, 2009 to receive his first Railroad Retirement Disability Check. **(See Attached exhibit 3 & 4)**

11. At the time these court proceedings began, petitioner was suffering from life altering circumstances, he was suffering from chronic pain and limited mobility at times, he has lost 2/3 of his income and all his benefits, especially his very valuable health and dental insurance.

12. The Third District Court ordered Mr. Osborne to pay alimony during his waiting period when he had no income, which is a modification from his Divorce Decree that states alimony would end upon his retirement.

13. Trial court did not follow the proper procedure and abused its discretion. Action to Modify a divorce decree should be brought in the forum which issued the decree.' Angell V. Sixth District Ct 656 p.9 405, (Ut 1982). January 20, 2009 Ms. Osborne filed a petition to have the Arkansas case heard in Utah.

14. Petitioner admits he owed the respondent Alimony for half of September 2008 (\$250) October, November, and December 2008. Half of January 2009, for a total of \$1800. After that he had no income.

15. Petitioner paid Respondent \$3,000 in June 2010. His debt to the respondent should be considered paid in full, and any other amounts should be null and void because he was disabled and without income for half of January 2009 through July 31st, 2009.

16. Respondent chose not to work after their children were grown. Even though she had the ability to work, she would often quit her job. January 2009 when Mr. Osborne was forced to retire, Ms. Osborne was employed earning good wages and went from temporary to permanent employment with benefits.

17. Petitioner received retirement award August 5, 2009, two months later by order of the Utah courts, his Tier II was taken away from him.

(See attached exhibits 5, 6 and 7). When Respondent began receiving Mr. Osborne's Tier II of \$341.65 she promptly quit her job to move to Phoenix, Arizona.

17. Respondent has the opportunity to work and build her retirement, while Mr. Osborne is no longer able to work.

18. Respondent is not of retirement age and would not be collecting any retirement until she reaches the age of 62. Mr. Osborne's unfortunate disability retirement annuity should not have been taken from him; it should be treated like Social Security Disability which is protected.

19. Petitioner was ordered to pay respondent's attorney's fees, even though he was not employed. Mr. Osborne has been left financially devastated; his own attorney fees \$3,600 which accumulated after his loss of employment.
20. There was a clerical error in the letter sent to Ms. Osborne from the Railroad Retirement Board concerning the Marital settlement agreement states that your support will stop upon your ex-husband's retirement "...at which time that portion previously allocated for the Respondent [**Teddy E. Osborne**], (mistake because the respondent is Ms. Osborne), portion of the Railroad retirement pension plan will be paid in lieu of monthly support payments". The seemingly small error affects how the document is read and understood. (**See exhibit 8**).

SUMMARY OF ARGUMENT

I. The 'Enforcement of Foreign Judgment' was used improperly to take Petitioner's Retirement from him. Actions in the Third District Court were not in any way enforcing an Arkansas Judgment, because there was no judgment in the Marital Settlement Agreement that said Respondent would get "Petitioner's Tier II. Neither did the judgment say Mr.

Osborne would have to pay Alimony after he retired, no modification should have been necessary and costly court actions and attorney's fees should not have been necessary to end alimony as it were already stated in the Arkansas Settlement Agreement.

II. According to the way the Property Settlement agreement is worded

Mr. Osborne would pay alimony until his retirement. Mr. Osborne's retirement began January 13, 2009, the courts of Utah ordered him to pay from January 13, 2009 through July 13, 2009 even though he had no income during that time.

III. The trial court erred by dividing petitioner's Railroad Retirement benefits as a final disposition of property. The court erroneously altered a Marital Settlement Agreement that was merged and incorporated into an Arkansas Divorce Decree. The Arkansas Court had continuing, exclusive jurisdiction over the parties pursuant to Arkansas Code 9-17-205(f) and A.C.A. 9-17-206(c)

IV. The division of Mr. Osborne's Retirement was not a part of the Marital Settlement Agreement. There is only reference to "that portion previously

allocated for **Respondent** by the Railroad retirement pension plan”. The Railroad Retirement pension plan has a ‘Divorced Spouse Benefit’. With Mr. Osborne being on Disability, Respondent should not be allowed to benefit from his misfortune.

V. Petitioner should not have had to pay the Respondent’s attorney fees; each party should be responsible for their own. The petitions filed were after Mr. Osborne began his disability retirement which should have ended his alimony as stated in the Marital Settlement Agreement it was unforeseeable at the time of the divorce that Mr. Osborne would be retiring before Respondent.

ARGUMENT

Petitioner was forced into early retirement disability on January 13, 2009 which began his 6 month waiting period before he would get his first Disability check from the Railroad. Mr. Osborne’s Arkansas Alimony order called for it to end the day he retired. Respondent asked the order to be enforced after the Petitioner began his retirement. A portion of the alimony Mr. Osborne has been ordered to pay is what accumulated after he had already retired.

Mr. Osborne could not stop the accumulating alimony while waiting for the 'Motion to show cause' hearing. Arkansas Marital Settlement Agreement states that payment of spousal support will end upon Mr. Osborne's retirement. Trial court abused its discretion when it ordered the payments from January 2009- July 2009 to be paid by Mr. Osborne, when his Divorce decree clearly stated that payments would end upon retirement which began officially January 13, 2009. The money judgment for any payments beyond that date should be reversed and considered not a part of the judgment that he was ordered to pay. Petitioner could not file a 'Motion to Modify Alimony' in Utah, even though there was a foreign domestic order filed in this state, petitioner could not get his alimony modified in the state of Utah. ***Bankler v. Bankler*** 963 P.9 797 (Utah App. 1998) "Under the Utah Foreign Judgment Act district court lacks subject matter jurisdiction to prospectively modify spousal maintenance provision of California Divorce Decree." Actions to modify a divorce decree should "properly be brought in the forum which issued the decree." ***Angell V. Sixth Dist. Court***, 656 P.2d 405, 406-07 (Utah 1982)

Respondent's (Ms. Osborne) filing of the 'Arkansas Judgment in Utah' under Utah Foreign Judgment Act does not allow the Utah court to reopen, reexamine, or alter a foreign judgment. Marital Settlement Agreement did not award Respondent the Petitioners Tier II retirement. Mr. Osborne's

disability retirement at the age of 60 could not have been foreseen at the time of the divorce in Arkansas in 2003.

The Osborne's settlement agreement states "upon retirement of the petitioner, at which time that portion previously allocated for the **Respondent** (Railroad Retirement Divorced Spouse Benefit) by the Railroad retirement pension plan, will be paid in lieu of monthly support payments. The agreement does not say that portion previously allocated for **Petitioner** because Respondent has her own retirement pension plan, which she does not meet the age requirements to collect hers at this time. Mr. Osborne could not have known in 2003 his ability to work would end so abruptly, consequently ending the opportunity to build a larger retirement. Respondent who is not at the age of retirement should not be able to benefit from Petitioners unfortunate disability. Respondent is capable of working to build herself a larger retirement. The trial court erred by concluding that Petitioner's 'Marital Settlement Agreement' which was incorporated into an Arkansas Divorce Decree, could be reexamined or altered in the State of Utah under the Foreign Judgment Act. Mr.

Osborne's Agreement did not include his Tier II annuity; however, the trial court signed an order awarding the Tier II to Ms. Osborne which was a

clear alteration of the Arkansas Divorce Decree.

Our supreme court discussed the limited ability to address issues decided in a foreign judgment in Data Management Systems, Inc. v. EDP Corp., 709 P. 2d 377 (Utah 1985). Because the Utah Supreme Court gave full faith and credit to the "judgment and determinations of the Wisconsin courts," id., the court held that neither Rule 60 (b) nor our Utah Foreign Judgment Act allows our Utah courts to reopen, reexamine, or alter a foreign judgment duly filed in this state, absent a showing of fraud or the lack of jurisdiction or due process in the rendering state. Only these defenses maybe raised to destroy the full faith and credit owed to the foreign judgment sought to be enforced under the Foreign Judgment Act.

The Arkansas Judgment that was filed in Utah to be enforced did not include division of petitioner's retirement benefits. The judgment states that upon retirement of the petitioner, that portion previously allocated for respondent by the Railroad retirement pension plan would be paid in lieu of monthly support payments. The Arkansas 'Marital Settlement Agreement'

was not in compliance with Title 20 of the Code of Federal Regulations, **Part 295** for dividing Mr. Osborne's retirement (Tier II annuity). The Railroad Retirement Board did not except the original property settlement because it did not direct the R.R.B. to take Mr. Osborne's retirement ¹. The trial court abused its discretion when it issued a Qualified Domestic Relations Order (Q.D.R.O.), an order that would take Mr. Osborne's Tier II away from him after he had already received the annuity for two months.

Trial court's issuance of a Qualified Domestic Relations Order (Q.D.R.O.) was an improper division of petitioners Railroad Retirement Benefits. The Marital Settlement Agreement was not in compliance according to Title 20 of the Code of Federal Regulations, **Part 295**

The Utah courts erred in their signing a Q.D.R.O. order, from a Divorce Decree that was clearly not in the States Jurisdictional boundaries. The trial court and the Railroad Retirement Board did not follow Federal Regulations Part 295.

¹ The decree must obligate the Railroad Retirement Board rather than the employee to make direct payments to the spouse (20 CFR 295.3(a)).

CONCLUSION

The Third District Court did not have proper jurisdiction in matters concerning an Arkansas Divorce Decree. Venue and Jurisdiction was only proper in the Circuit Court of Cleburne County, Arkansas. The case was not transferred until January 2010. *Bankler v. Bankler* 963 p.9 797 (Ut. app 1998). Under the **Utah Foreign Judgments Act**, District Court lacks subject matter jurisdiction to prospectively modify spousal maintenance.

A Marital Settlement Agreement was signed by both parties and “merged and incorporated the Divorce Decree.”

The original Arkansas Divorce Decree does not correctly provide for the division of the Petitioner’s Railroad Retirement Annuities and any Division of the Petitioner’s Railroad Retirement Annuities is therefore invalid.

There were several errors in dividing the Petitioner’s retirement annuities when the Divorce Decree is read in comparison to the Railroad Retirement Boards Requirements. Notably, the decree did not provide for the division of the employee’s benefits under the Railroad Retirement Act, as distinguished from payments under any private pension (20 CFR 295.3(a)(1)). The decree did not provide for the division of the employee’s benefits as part of a final

disposition of property between the parties, rather than as an award of spousal support (20 CFR 295.2).

Petitioner holds that the trial court misread his Marital Settlement Agreement, it did not state the respondent would get petitioners retirement, it states “at which time the portion previously allocated for the **respondent** by the Railroad Retirement Pension Plan” would be paid. Petitioner and Respondent had knowledge of the ‘Divorced Spouse Annuity’ and of how the Railroad Pension Plan worked. Petitioner never said Ms. Osborne would get his retirement.

Mr. Osborne, therefore, requests this Court to overturn the decision of the lower court and correct the errors that were made, Mr. Osborne ask the Court to take a close look at the exhibits and the Dates relevant to his retirement. Mr. Osborne asks the court to examine Title 20 of the Code of Federal Regulations, Part 295 which describes the proper provisions for dividing an Employees benefit under the Railroad Retirement Act. Mr. Osborne’s retirement benefits should be returned to him as they were not divided properly. An amended Q.D.R.O. should be sent to The Board’s Bureau of Law in Chicago that would allow for the original Disability Annuity to be restored to Mr. Osborne. Petitioner requests this Court to reverse the trial court’s money judgment to coincide with the date of retirement. Mr. Osborne will be responsible for alimony that was owed up to

January 13, 2009 (\$ 1,950). Mr. Osborne also requests the court reverse the award of attorney's fees by the trial court and that each party pay their own.

DATED this 13th day of August 2010.

Teddy Eugene Osborne

Teddy Eugene Osborne, Petitioner/Appellant

CERTIFICATE OF SERVICE
IN THE UTAH COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

TEDDY EUGENE OSBORNE,

CASE No. 094900234

Petitioner and Appellant

v.

CERTIFICATE OF SERVICE

NEGHA JEAN OSBORNE

Respondent and Appellee

I, Teddy Eugene Osborne, Appellant in the above action hereby certify that on this day I personally served the forgoing **BRIEF OF APPELLANT** by personally depositing copy thereof with the United States Postal Service, postage prepaid, to:

**Utah Court of Appeals
Appellate Clerks' Office
450 South State, Fifth Floor
P.O. Box 140230
Salt Lake City, Utah 84004-0230**

**Respondent/Appellee
Negha Jean Osborne
P.O. Box 8225
Phoenix, Arizona 85006**

DATED this 16th day of August 2010



TEDDY EUGENE OSBORNE Petitioner/Appellant